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No. 85-1259

JOSEPH F. SPANIOLO, JR.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD LUNN TULL,
v. *Petitioner,*

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

**BRIEF AMICUS CURIAE OF THE
CHAMBER OF COMMERCE OF THE UNITED STATES
IN SUPPORT OF THE PETITIONER**

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QUESTION PRESENTED

Whether the defendant is entitled to a jury trial under the seventh amendment to the U.S. Constitution in a civil action initiated by the Government in federal district court to recover substantial civil penalties pursuant to a federal statute.

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STATEMENT OF INTEREST

With the written consent of all parties,¹ the Chamber of Commerce of the United States ("Chamber") respectfully submits this brief *amicus curiae* in support of the Petitioner. The Chamber is the nation's largest federation of businesses. It represents more than 180,000 companies as well as several thousand trade and professional associations, and state and local chambers of com-

¹ The consent letters have been filed with the Clerk of the Court.

merce. Nearly every one of the Chamber's members is regulated in some fashion by the United States Government under a statute through which civil penalties may be imposed in a United States district court action.

In the last fourteen years, the regulated business community has seen a sevenfold increase in the number of federal statutes under which the United States Government may impose civil penalties. The advantage to the government in pursuing regulatory enforcement actions under these schemes is clear: civil penalty prosecutions do not entail the same constitutional protections for the defendant that are available in a criminal proceeding. Thus they do not impose procedural "obstacles" such as grand jury proceedings, indictments, and discovery. Civil penalty prosecutions also require less rigorous application of due process protections such as statutes of limitation. Moreover, the government's burden of proof in a civil penalty proceeding is far less onerous. However, the procedural protection of trial by jury, as required by the seventh amendment, serves to ensure citizen involvement in the prosecutorial process, and thus is a vital protection from arbitrary government action against the defendant.

As this case demonstrates, the consequences of a civil penalty proceeding are severe. The Petitioner has noted that the maximum penalty which could have been imposed against him under the Federal Water Pollution Control Act ("Clean Water Act" or "Act") would have exceeded \$22 million. Petition for Certiorari at 6. In cases such as this, the right to a jury trial under the seventh amendment stands as the only meaningful opportunity for citizens to scrutinize government discretion. If the erroneous decision of the Fourth Circuit is not reversed, prosecutorial authorities in the future will be given complete discretion to escape the reach of this fundamental constitutional protection merely by electing to proceed under civil penalty provisions.

STATEMENT OF THE CASE

This case arises out of a civil penalty prosecution under the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1982 & Supp. II 1984). Petitioner Edward Lunn Tull is a developer of residential properties on the island of Chincoteague in southeast Virginia. The Government's complaint alleged that Tull had filled wetlands, as defined by 33 C.F.R. § 323.2(c), adjacent to navigable waters in violation of the Act.

Tull's demand for a jury trial under the seventh amendment was denied by the United States District Court for the Eastern District of Virginia. Trial on the merits began in July 1982. After the Government rested its case, Tull sought a partial directed verdict. The Government then was permitted to amend its complaint to allege a violation of 33 U.S.C. §§ 403 and 406 (River and Harbor Act). Tull's defense of equitable estoppel was rejected.

The district court, which found a violation of the Act, ordered Tull to pay a "penalty or civil fine" under § 1319(d) of the Act in the amount of \$325,000. The district court offered Tull the option of obtaining a suspension of \$250,000 of the fine if he would restore the drainage ditch to its original condition. Tull's petition to relocate the drainage ditch to an alternative location, on the ground that restoration of the original ditch was impossible because he had sold the land to third parties, was refused by the district court. Additionally, the district court ordered restoration of a portion of the land by the removal of fill material.

The United States Court of Appeals for the Fourth Circuit affirmed the district court in a two-to-one decision. The majority held that the seventh amendment did not apply to this civil penalty proceeding and also rejected Tull's claim of equitable estoppel. The dissenting

member voted to reverse on both grounds. Tull's petition for rehearing *en banc* was denied by a vote of six-to-five. No. 84-1766 (4th Cir. Oct. 30, 1985). The Court granted certiorari on May 27, 1986. 54 U.S.L.W. 3777.

SUMMARY OF ARGUMENT

The right to jury trial contained in the seventh amendment to the U.S. Constitution for those charged with civil penalties under federal regulatory statutes should be preserved as a protection against arbitrary governmental action.

Supreme Court precedent supports the right of a jury trial in civil penalty cases under federal statutes where a system of administrative agency adjudication has not been established by Congress. The federal statute involved in this case, the Clean Water Act, vests enforcement adjudication in the district courts of the United States. 33 U.S.C. § 1319. Therefore, the seventh amendment right to a jury trial should apply to enforcement actions at law under the Clean Water Act. Moreover, civil penalties are within the scope of the seventh amendment's protection because they are remedies at law as opposed to equitable remedies. Civil penalties do not lose their status as legal remedies simply because they may be imposed in combination with equitable remedies such as injunction.

The lower court in this case erroneously denied Petitioner his right to a jury trial by mistakenly interpreting Supreme Court precedent and by incorrectly construing the Clean Water Act's civil penalty as an equitable remedy. The Court should reverse these erroneous interpretations of constitutional and statutory law and provide the Petitioner, charged with a civil penalty under the Clean Water Act, the jury trial to which he is entitled under the seventh amendment.

ARGUMENT

I. THE SEVENTH AMENDMENT TO THE CONSTITUTION GUARANTEES THE RIGHT TO A JURY TRIAL IN CASES WHERE A CIVIL PENALTY HAS BEEN ASSESSED PURSUANT TO A FEDERAL STATUTE

The seventh amendment to the Constitution of the United States provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved

This is a fundamental protection of the Bill of Rights and is one of the cornerstones of our judicial system. Thus, the decision of the U.S. Court of Appeals for the Fourth Circuit curtailing the right to a jury trial should be scrutinized with the utmost care. *See Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (quoted with approval in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959)).

A. The Right To A Jury Trial In Civil Penalty Cases Is Necessary To Protect Citizens From Arbitrary Government Action

With the proliferation of civil penalty provisions in federal regulatory statutes, this nation's regulated business community is seriously affected by any curtailment of procedural protections which act as a check against arbitrary prosecution.² *Amicus curiae* thus urges the Court to maintain the integrity of the seventh amendment right to jury trial by recognizing its applicability in civil penalty cases.

Moreover, *amicus* is greatly troubled that a curtailment of the right to jury trial in civil penalty cases, such as the one at bar, will encourage the government to choose

² Petitioner has identified 225 federal statutes, all but 30 of which have been enacted since 1972, that provide for the imposition of civil penalties by the government. Petition for Certiorari at 16.

arbitrarily which type of penalty to seek, civil or criminal, against the business community in order to circumvent the procedural protections afforded the defendant. The Constitution does not permit the government to determine a defendant's procedural protections, and the Court should not allow such a result to occur.

Amicus acknowledges that recognition of the right to a jury trial in this case could increase the number of jury trials in the district courts. Nevertheless, as the Court has previously noted, such a concern over judicial workload, albeit important, cannot be permitted to override the concerns underlying the seventh amendment. *Curtis v. Loether*, 415 U.S. 189, 198 (1974). Moreover, little real increase in the district court docket will occur. Cases prosecuted under the statutes in question still would be brought in the district court regardless of whether they are tried before a jury. In many of these cases, the defendant likely will not elect a jury trial.³ And the judge in a jury trial proceeding still retains the authority to grant summary judgment or a directed verdict in appropriate cases, thus reducing the potential burden of increased jury trials. See *Pernell v. Southall Realty*, 416 U.S. 363, 384-85 (1974).

B. Supreme Court Precedent Supports The Right To Jury Trial In A Civil Penalty Case Under The Clean Water Act

The right to a jury trial in civil penalty cases is fully consistent with the precedents established by the Court in previous seventh amendment cases.⁴ The Court has

³ For example, in the environmental cases under statutes which comprise a substantial number of those providing for civil penalties, a corporate defendant assessed a civil penalty would likely prefer a bench trial.

⁴ The Court previously has reserved the precise question whether a right to jury trial exists in civil penalty cases. *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442, 449 n.6 (1977).

held that Congress, without contravening the right to jury trial, may provide for adjudication of statutory claims by an administrative agency without a jury. *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977). But where Congress has not so specifically provided, the right to jury trial is retained. *Pernell v. Southall Realty*, 416 U.S. at 383; *Curtis v. Loether*, 415 U.S. at 195.

Congress did not construct a system of administrative agency adjudication under the civil penalty provision of the Clean Water Act, 33 U.S.C. § 1319(d). Rather, it expressly committed this adjudication to federal district court where, pursuant to Federal Rule of Civil Procedure 38(a), the seventh amendment right to a jury trial is applicable. Congress has provided for administrative adjudication procedures under other statutes and plainly could have done so under the Clean Water Act had it desired. The fact that Congress enacted no such provision in this case indicates its intent to retain the procedural protections, including the right to a jury trial, incident to district court jurisdiction.

Moreover, previous decisions of the Court have strongly implied that defendants in civil penalty cases are entitled to a jury trial. See, e.g., *Hepner v. United States*, 213 U.S. 103, 115 (1909) (civil penalty under § 5 of Alien Immigration Act); *United States v. Regan*, 232 U.S. 37, 47 (1914) (civil penalty under § 5 of Alien Immigration Act); *Atlas Roofing*, 430 U.S. at 460 (civil statutory fines enforceable through administrative agency or judiciary; if judiciary, *Hepner* and *Regan* support jury trial requirement).

By the terms of the seventh amendment, the right to a jury trial extends to civil cases at law as opposed to actions in equity.⁵ Civil penalties are legal remedies, not

⁵ It is a well settled principle that the right to a jury trial is not restricted to the common law actions that existed at the time

equitable ones. A civil penalty's closest analog is punitive damages which are, of course, legal in nature and triable to a jury. See *Curtis v. Loether*, 415 U.S. 189, 196 (1974). The purposes of punitive damages are to deter future conduct of the same type and to punish the responsible party by exacting a sum of money, often a large sum, from him. *Id.* These are exactly the purposes of a civil penalty—deterrence and punishment. Civil penalties, in essence, are statutory provisions for punitive damages. Therefore, civil penalties are legal in nature and fall within the protection of the seventh amendment.

Amicus recognizes that not all monetary claims are causes of action at law. See *Curtis v. Loether*, 415 U.S. at 196. Restitution, for example, can be monetary relief but is equitable in nature as it seeks to return to an injured party something that rightfully belongs to him. *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946). Restitution thus is significantly different from a civil penalty awarded under a statute. *Id.* A civil penalty does not contain the element, characteristic of equitable relief, of returning something to a party of which he was wrongfully deprived. Rather, a civil penalty imposes a punishment on a party by requiring him to disgorge a monetary sum and is therefore characteristic of a remedy at law.

Petitioner's right to a jury trial in this case thus is not defeated merely because remedies equitable in nature—an injunction and restoration of land—were sought

of the seventh amendment's enactment. *Curtis v. Loether*, 415 U.S. 189, 193 (1974); *Pernell v. Southall Realty*, 416 U.S. 363, 374 (1974). The seventh amendment does apply to causes of action created by statute. *Id.* To the extent that any language in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937), contradicts this principle, such language has been disapproved by the Court's subsequent cases. And to the extent that the lower court below and the Government rely on the discredited notion that a cause of action unavailable under the common law of 1791 does not qualify for a jury trial, they are clearly in error.

by the Government in addition to the civil penalty. When equitable and legal relief are joined in one action, the seventh amendment right to jury trial is preserved with respect to the legal claim. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Ross v. Bernhard*, 396 U.S. 531 (1970). Moreover, it is irrelevant to the jury trial issue whether the legal remedy sought can be characterized as incidental to the equitable relief. *Dairy Queen*, 369 U.S. at 470; *Ross*, 396 U.S. at 537. Any language to the contrary contained in the Court's early decision of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937), has clearly been disapproved by the subsequent decisions of the Court quoted above.

C. The Fourth Circuit's Denial Of Petitioner's Right To Jury Trial Is Erroneous

The Fourth Circuit's denial of a right to jury trial in this case, based on its view that the civil penalty "intertwines" with the equitable relief sought, *United States v. Tull*, 769 F.2d 182, 187 (4th Cir. 1985), is plainly in error. The Fourth Circuit supported its "intertwining" theory with an erroneous interpretation of prior Supreme Court cases: (1) *Jones & Laughlin*, 301 U.S. at 48, whose language on legal remedies being "incidental" to equitable remedies has been disapproved by *Beacon Theatres* and *Dairy Queen* (neither of which were cited or distinguished by the lower court); and (2) *Atlas Roofing*, 430 U.S. at 453, which only quoted the language of *Jones & Laughlin* to decide the issue of NLRB's power to order back pay and not to decide whether a right to jury trial existed.

Furthermore, the Fourth Circuit's alternate ground for denying Petitioner's right to jury trial, that the civil penalty in this case is not a set amount but rather a maximum amount subject to precise determination at trial, is unsupported by any prior precedent of this Court.

Indeed, the lower court did not cite any precedent to support its view because none exists. Nor is the Fourth Circuit's view supported by a reasoned analysis of the nature of provisions for civil penalties or the nature of civil damages. The precise amount of damages to be awarded in a civil suit at law (compensatory or punitive), regardless whether a set amount is demanded in the complaint, is an issue to be determined by the jury. The fact that discretion must be exercised to determine the precise amount of recovery does not convert the remedy of compensatory or punitive damages into an equitable proceeding triable without the right to a jury trial. See *United States v. J.B. Williams Co.*, 498 F.2d 414, 427 n.15 (2d Cir. 1974). Similarly, the fact that the precise amount of a civil penalty is not stated in the statute, but is discretionary, does not convert the civil penalty into an equitable remedy for which no jury trial is available.

Neither can a civil penalty under § 1319(d) of the Clean Water Act be converted into an equitable remedy by reference to those equitable remedies that *are* available under the Act—injunction and “appropriate relief” as stated in § 1319(b) and § 1319(f). The Act itself distinguishes civil penalties from equitable remedies by placing civil penalties in a separate section of the enforcement provisions available under the Act. Nothing in the remainder of the Act or its legislative history indicates any intention that civil penalties are to be considered part of this Act's equitable remedies.

In addition, civil penalties under the Act cannot be converted into equitable remedies by vague references to the general “equitable” goals of the Act, defined in § 1251 as restoring and maintaining the integrity of the nation's waterways. Virtually all regulatory statutes have goals that are “equitable” in the sense of accomplishing a just regulatory purpose. But if this general principle of regulatory law is inappropriately extended so as to view *all*

remedies available under a particular statute as “equitable,” then every statute becomes an equitable one and the protection inherent in the seventh amendment's right to jury trial becomes meaningless.

This is precisely the flaw in the reasoning of *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501 (11th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3533 (U.S. Jan. 30, 1986) (No. 85-1292), which the Government cited to support its position in the instant case. In *M.C.C.*, the Eleventh Circuit erroneously denied the right to a jury trial for civil penalties under the Clean Water Act and the River and Harbor Act because it considered these statutes “equitable in nature.” 772 F.2d at 1506-07. Although these statutes do permit equitable remedies to be available, and although these statutes embody “equitable” goals, their civil penalty provisions retain the distinct character of remedies at law by virtue of their deterrent and punitive purposes. The Court should not allow the Eleventh Circuit's erroneous interpretation to the contrary to stand.⁶

In contrast to the *M.C.C.* decision, the Second Circuit in *United States v. J.B. Williams Co.*, 498 F.2d 414 (2d Cir. 1974), comprehensively and persuasively analyzed

⁶ The Government also cites the Court's holding in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), as support for construing the civil penalties of the Clean Water Act as equitable. This is plainly wrong. The Government erroneously characterizes the holding as follows: “a district court in a Clean Water Act proceeding is called upon to exercise its ‘traditional equitable discretion in enforcing the statute.’” Brief for the United States in Opposition (“Brief in Opposition”) at 7. However, the limited holding in the *Romero-Barcelo* case was actually that the Clean Water Act *allowed* a court to exercise equitable discretion in determining whether to enjoin or order other equitable relief to correct a violation of the Act's water pollution permit requirements. This is distinguishable from, and not supportive of, the contention that the Clean Water Act is entirely an “equitable” statute such that all its remedies, including civil penalties, are equitable in nature.

the nature of civil penalties imposed under federal statutes⁷ to hold that the right to jury trial is preserved in these cases. The Second Circuit applied the precedents of this Court in *Hepner*, *Regan*, *Curtis v. Loether* and *Southall Realty*, and determined that an action to recover a statutory penalty carries the right to jury trial, irrespective of whether the statutory penalty is a fixed amount or a variable amount with a stated maximum. 498 F.2d at 426-27. The Court should apply the thoughtful reasoning of Judge Friendly in the *J.B. Williams* case to the case at bar and hold that the remedy of a civil penalty retains the right to a jury trial.⁸

⁷ The specific statutory civil penalty provision involved in the *J.B. Williams* case was § 5(e) of the Federal Trade Commission Act, 15 U.S.C. § 45(e).

⁸ The Government weakly attempts to dismiss the *J.B. Williams* case because the statute in that case was not the Clean Water Act and it provided only for civil penalties, not a "package" of remedies. Brief in Opposition at 9 n.12. This is not persuasive for several reasons. First, the reasoning of the *J.B. Williams* case with respect to civil penalties was clearly general in nature and not specific to the civil penalty of the Federal Trade Commission Act. Second, as discussed *supra* pp. 8-9, whether a civil penalty is part of a "package" of remedies is not determinative of the right to a jury trial.

Moreover, to the extent that the Government relies on two district court cases to support the proposition that Clean Water Act enforcement actions do not carry a right to jury trial, Brief in Opposition at 5 n.5, *amicus* submits that these two cases are in error. The first, *United States v. Atlantic Richfield Co.*, 429 F. Supp. 830, 839 n.13 (E.D. Pa. 1977), *aff'd without opinion sub nom. United States v. Gulf Oil Corp.*, 573 F.2d 1303 (3d Cir. 1978), characterized this Court's decision in *Atlas Roofing*, 430 U.S. 442 (1977), as a denial of a claim for a jury trial under a civil penalty provision, in order to deny Atlantic a jury trial. This is patently incorrect; the *Atlas Roofing* case held that Congress could establish administrative adjudication plans and explicitly left open the jury trial issue. 430 U.S. at 449 n.6. The second case, *United States v. Lambert*, 19 Env't Rep. Cas. (BNA) 1055 (M.D. Fla. 1983), an unpublished decision not entitled to precedential weight, erroneously

II. CONCLUSION

For these reasons and those stated in Petitioner's Brief, the decision of the court below should be reversed.

Respectfully submitted,

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characterized a civil penalty under the Clean Water Act as an equitable remedy because the amount is not fixed and its purpose is deterrence. As discussed *supra* pp. 8-10, neither of these criteria correctly characterizes an equitable remedy.

In addition, the Government's position that no factual issues suitable for jury trial are raised in this case is incorrect. Although *amicus* was not involved in the trial of this case, it understands that the case required a fifteen-day trial and that over thirty witnesses were heard. The district court's opinion contains extensive findings of fact, 615 F. Supp. at 613-20, and indicates that the trial required an on-site viewing of the property that is the subject of this case.